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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1256

KOEHRING COMPANY, *Petitioner*

vs.

HYDE CONSTRUCTION COMPANY, INC.,
Respondent

REPLY BRIEF OF PETITIONER IN RESPONSE TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Respondent's brief in opposition has raised several arguments which seem to require a reply.

In the Petition it was pointed out that on review of the same September 1, 1964 injunction order involved here, this Court denied Hyde's request for further review by the Tenth Circuit and remanded this case directly to the Oklahoma Federal Court for further proceedings. Respondent contends on pages 13-15 of its brief that only the transfer jurisdiction issue was presented to this Court at that time.

That simply is not the fact. Respondent, itself, in its Petition for Rehearing and Motion to Amend Order of Remand, filed with this Court in January 1966, presented to this Court the issues it now contends were not discussed or decided by this Court. (Appendix to G Petition). If this Court, by its refusal to remand to the Court of Appeals, did not intend to settle the validity of the September 1, 1964 order, the subsequent remand directly to the Oklahoma District Court had no meaning whatsoever. That court had clearly stated that the only proceeding it intended to carry on was the retrial of the case and this was expressly recognized by this Court in its January 17, 1966 opinion. (Appendix F to Petition).

Respondent also argues that Petitioner rejected the Federal forum. Nothing could be further from the truth. In discussing Petitioner's motion to dismiss the Mississippi Federal Court case, Respondent failed to mention the fact that Petitioner filed a suit against Respondent in the Oklahoma Federal Court on August 31, 1961, one day after Respondent filed its suit in the Mississippi Federal Court. Petitioner's suit arose out of the same transaction as did that of Respondent. If Petitioner had been successful in its motion to dismiss the Mississippi Federal Court suit, Respondent's claim would have become a compulsory counterclaim in the Oklahoma Federal Court suit under Rule 13(a) of the Federal Rules of Civil Procedure.

Respondent also argues that Petitioner "elected" not to remove the Mississippi State Court action to the federal court. The "election" was made in reliance on representations of Respondent's counsel. Respondent's counsel had assured Petitioner that the state court suit had been

filed merely to protect Respondent in case *jurisdiction* was not upheld in the Mississippi Federal Court action, and that the state court action would be dismissed by Respondent if federal court jurisdiction were maintained (R. 150-152). Almost fifteen months later, although federal court jurisdiction had been maintained, Respondent's counsel first demanded that Petitioner file an answer (R. 256-59). Of course, the time to remove the case has long since passed.

Petitioner defended itself in the Mississippi State Court action because it saw no other choice. It did, however, take the position throughout the state court proceedings that the federal case should be tried first. In its answer, and repeatedly thereafter, it pleaded for dismissal or for a stay pending final disposition of the federal suit. (R. 277-279). Petitioner proceeded to trial only when ordered to do so by the Mississippi State Court. Inexplicably, the state court was unwilling to follow the general practice that a later filed action be held in abeyance pending determination of an earlier filed action between the parties involving the same issues.

Finally, Respondent questions why Petitioner did not file a petition for certiorari from the Mississippi Supreme Court's decision. This Court, in the meantime, had announced its decision on Petitioner's first petition for certiorari. 382 U.S. 362 (Jan. 17, 1966). Petitioner interpreted this Court's decision to mean that the Oklahoma Federal Court's decision had been affirmed* and, therefore, that there was no need to proceed with alternative procedures (such as review of the Mississippi Supreme Court's decision) to attain the same result.

*The Oklahoma Federal Court, in denying Respondent's motion to dissolve its injunction, interpreted this Court's decision in the same manner. (R. 245-246).

For the foregoing reasons, it is submitted that Koehring's petition for certiorari should be granted.

Respectfully submitted,

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Dated April 25, 1968